

SEP 02 1997

SECRETARY, BOARD OF
OIL, GAS & MININGBEFORE THE
BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In Re Petition Filed by the Division of
Oil, Gas & Mining for an Order
Requiring Immediate Reclamation of
the Drum Mine in Millard County,
Utah By Western States Minerals
Corporation and Jumbo Mining
Company

ORDER RESOLVING PRE-
HEARING DISCOVERY
MOTIONSDocket No. 97-009
Cause No. M/027/007

Pursuant to notice, at its regularly scheduled meeting held August 27, 1997 at 10 a.m. in the Natural Resources Building at 1594 West North Temple, Hearing Room 1040, the Board of Oil, Gas & Mining (the "Board") heard two preliminary discovery-related motions in the above matter.

The first motion, filed by Western States Minerals Corporation ("Western") was entitled, "Motion for Order Granting Discovery" (7/28/97) (hereinafter "Western's Motion"). The second motion, filed by Jumbo Mining Company ("Jumbo"), was entitled, "Response of Jumbo Mining Company to Motion for Order Granting Discovery" (8/22/97) (hereinafter "Jumbo's Cross-Motion"). The Board also had before it the "Reply of Western to Response of Jumbo to Western's Motion for Discovery, and Response to Jumbo's Cross-

Motion for Protective Order" (8/26/97) (hereinafter the "Reply").

The following Board members were present and participated at the hearing:

Dave D. Lauriski, Chairman
Jay L. Christensen
Elise Erler
Thomas B. Faddies
Wayne Allan Mashburn
Raymond Murray

Board member Stephanie Cartwright was not present.

Lowell P. Braxton, Acting Director of the Division of Oil, Gas and Mining (the "Division"), and members of his staff, were present at the hearing but they did not testify.

The Division was represented by Daniel G. Moquin, Esq., Assistant Attorney General, State of Utah. Western was represented by H. Michael Keller, Esq., Van Cott, Bagley Cornwall & McCarthy, Salt Lake City. Jumbo was represented by Lawrence J. Jensen, Esq., Holland & Hart, Salt Lake City.

Patrick J. O'Hara, Esq., Assistant Attorney General, State of Utah, acted as Board counsel in this matter.

The Board has considered the arguments presented at the hearing and in the papers filed by the parties. Now, being fully advised of the premises, and

for good cause appearing, the Board hereby makes the following Discovery Order:

This matter is a formal adjudication under the procedural requirements of (a) the Utah Administrative Procedures Act, Utah Code Ann. §§ 63-46b-1 et seq. (1953, as amended) ("UAPA") and (b) the "Rules of Practice and Procedure Before the Board of Oil, Gas & Mining," Utah Admin. Code R641 (the "Board Rules").

Section 7 of UAPA, entitled, "Procedures for Formal Adjudicative Proceedings - Discovery and Subpoenas," states, in pertinent part:

(1) In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.

Utah Code Ann. § 63-46b-7 (1953, as amended). As part of the Board Rules, the Board has adopted a discovery rule to insure that parties who appear before the Board will have, as UAPA requires, "discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses." Id.

The Board's discovery rule, published at Utah Admin. Code R641-108-900

(entitled, "Discovery"), states in relevant part

"Upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery against another party . . . as may be prescribed by and in the manner provided by the Utah Rules of Civil Procedure."

Id.

In this matter, Western has moved for permission to conduct discovery under Rule 34(a)(2) of the Utah Rules of Civil Procedure, which states:

"(a) Scope. Any party may serve on any other party a request. . . .(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."¹

Id. In particular, for the period of time between the present date and the evidentiary hearing scheduled to begin October 22, 1997, Western asks for an Order allowing "WSMC, its agents and employees entry upon the premises of the

¹Utah Rule of Civil Procedure Rule 26(b)(1), entitled, "Discovery scope and limits," states in pertinent part: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:. . . (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Drum Mine for the purposes of measuring, surveying, photographing, testing, and sampling the heap leach piles, waste rock piles, adjacent soils and any surface or underground water found thereon. Such sampling may include the use of drilling equipment." See Western's Motion at 1-2.

The Board finds that Western's Motion is reasonably specific to put Jumbo on notice as to the nature and location of the intended sampling work. The Board further finds that the request is reasonable in scope under the particular circumstances of this case, where the two companies are in litigation with each other and the Division concerning alleged reclamation liabilities and other issues at the Drum Mine.

The ultimate issue raised by Jumbo's Cross-Motion concerns the question whether the Board should impose any conditions on Western's access to the Drum Mine property. The Board is not persuaded that all of the conditions set forth in Jumbo's Cross Motion are warranted or reasonable under the circumstances of this case. That said, the Board is persuaded that certain conditions are in order, particularly where the all or some of the disturbed land in question is owned by the United States of America and managed by the Bureau of Land Management ("BLM").

Therefore, the Board hereby grants Western's Motion, and partially grants and partially denies Jumbo's Cross Motion, as follows:

Western, its agents and employees shall have the right to enter upon the premises of the Drum Mine for the purposes of measuring, surveying, photographing, testing, and sampling the heap leach piles, waste rock piles, adjacent soils and any surface or underground water found thereon. Such sampling may include the use of drilling equipment. Western's right to conduct such discovery is subject to the following conditions:

- a. To insure that all parties in this case are provided equal opportunity, all data, test results, reports, photographs, or any other information prepared as a result of Western's access to the site for such discovery shall immediately be provided by Western to Jumbo and the Division, at no cost.
- b. Western shall provide Jumbo with advance written notice of such entry at least 10 calendar days before the entry, and Jumbo shall be allowed to escort Western's personnel around the Drum Mine site.
- c. Any and all discovery activities occurring at the Drum Mine site must be in accordance with all applicable legal obligations and approved, as may be required, by any governmental agencies with operational jurisdiction over the Drum Mine.

d. Western shall be responsible for all of its activities, and all of the activities of its agents and employees, at the Drum Mine, and Western shall hold Jumbo harmless from liability, if any, incurred by Jumbo on account of Western's discovery activities at the Drum Mine.

For all purposes, a signed faxed copy of this Order shall be deemed the equivalent of a signed original.

Issued this 240 day of September, 1997.

STATE OF UTAH
BOARD OF OIL, GAS & MINING

By 
Dave D. Lauriski
Its Chairman

Certificate of Service

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing "ORDER RESOLVING PRE-HEARING DISCOVERY MOTIONS" this 3 day of September, 1997 to the following:

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